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No. 01-1677

IN THE

Supreme Court of the United States

JAMES SPAULDING, LYN SWONGER,
DONALD L. INMAN, WILLIAM N. NANCE,
Petitioners,

v.

UNITED TRANSPORTATION UNION
and
UNION PACIFIC RAILROAD COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT UNITED TRANSPORTATION UNION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the district court lacked jurisdiction over plaintiffs' duty of fair representation claim to the extent that it raised issues within the exclusive jurisdiction of the Surface Transportation Board and previously decided by that agency.

2. Whether the court of appeals correctly held that petitioners' arguments to toll the statute of limitations on their otherwise untimely claims failed as a matter of law because (1) no reasonable trier of fact could find that petitioners reasonably relied on alleged misrepresentations by the union, and (2) objections repeatedly raised by petitioners' local union representative and repeatedly rejected by the union could not toll the statute of limitations.

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STATEMENT OF THE CASE

Through this action, petitioners challenge the manner in which their seniority rights were integrated with the seniority rights of other employees as a result of the merger of two railroads. Petitioners were employed as brakemen, conductors and switchmen, first for the Chicago, Rock Island and Pacific Railroad ("Rock Island"), and then for the St. Louis Southwestern Railroad ("SSW") after its purchase of a

portion of Rock Island's rail network. They are currently employed by respondent Union Pacific Railroad Co., which merged with Southern Pacific and its subsidiary, the SSW, in 1996. Petitioners are based at either the St. Louis, Kansas City or Salina Hubs operated by Union Pacific. Respondent United Transportation Union ("UTU") is petitioners' collective bargaining representative. Appendix to Petition for Writ of Certiorari ("Pet. App.") 3-4, 9.

In the railroad industry, employees bid on particular jobs and schedules using their "system seniority dates." These are usually based upon the date an employee took his first compensated trip for his current employer. Generally, if two employees within the same seniority district bid on the same assignment, the employee who holds the earlier seniority date wins the bid. If, however, a less senior employee retains a "prior right" in a location, he could win a bid over an employee with an earlier seniority date who does not have a prior right at that location. Pet. App. 4.

Petitioners' seniority rights were the topic of litigation once before following the SSW's purchase of the Tucumcari Line from the Rock Island in 1980. *See Volkman v. UTU*, 724 F. Supp. 1282 (D. Kan. 1989), *aff'd in part, rev'd in part*, 73 F.3d 1047 (10th Cir. 1996). In *Volkman*, the district court determined that petitioners were not entitled to retain their Rock Island seniority dates after that carrier's purchase by SSW. Instead, petitioners' seniority was properly set at March 24, 1980, the date upon which they were considered to be hired by SSW. The court also held that former Rock Island employees working on the Tucumcari Line were entitled to prior rights allowing them to bid ahead of other SSW employees for positions on the Tucumcari Line. In a subsequent ruling, however, the *Volkman* court clarified that petitioners' prior rights were potentially limited in duration because they were subject to modification through future

collective bargaining and arbitration procedures mandated by the Railway Labor Act and the Interstate Commerce Act. Pet. App. 5-6.

In 1996, Union Pacific and Southern Pacific sought authorization from the Surface Transportation Board[1] ("STB") to merge their operations and those of their subsidiaries, including the SSW. Pursuant to its statutory authority under 49 U.S.C. § 11323, the STB approved the merger on August 12, 1996. Pet. App. 4 n.1, 6; *see also Union Pacific Corp., et al—Control and Merger—Southern Pacific Rail Co., et al.*, STB Finance Docket 32760, Decision No. 44 (served Aug. 12, 1996), *available at* 1996 WL 467636. The STB conditioned its approval upon the imposition of labor protective provisions, known as the *New York Dock* conditions. The *New York Dock* conditions permit the merged carriers to do what otherwise would be prohibited by existing collective bargaining agreements, namely, to transfer work between them, provided that the employees who are adversely affected by such a transfer of work receive specific economic protections. Pet. App. 4 n.1, 6; *see also New York Dock—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, 84-90, *aff'd sub nom., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

The *New York Dock* conditions also set forth procedures for resolving disputes that arise over the implementation of a subject transaction. Article I, Section 4 provides a schedule for the negotiation and, if necessary, final and binding arbitration of an Implementing Agreement to govern any rearrangement of forces and the application of the protective provisions. Pet. App. 4, 63-65. The STB has exclusive

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[1] Pursuant to the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, codified at 49 U.S.C. §§ 10101, *et seq.*, as of January 1, 1996, the STB is the successor agency to the Interstate Commerce Commission. Pet. App. 5 n.1.

authority to review any arbitration award rendered under the *New York Dock* conditions. *See Chicago & N.W. Transp. Co—Abandonment*, 3 I.C.C. 2d 729, 736 (1987), *aff'd sub nom., Int'l Bhd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988). Jurisdiction to review STB decisions is vested solely in the United States Courts of Appeals. 28 U.S.C. §§ 2321, 2342(5).

On October 6, 1997 and January 30, 1998 respectively, Union Pacific provided notice under the *New York Dock* conditions of its intent to establish transportation hubs at St. Louis and Kansas City, Missouri. On June 4, 1998, Union Pacific gave notice regarding the creation of the Salina, Kansas Hub. Union Pacific and the UTU then engaged in negotiations to reach Implementing Agreements for all three hubs. Pet. App. 6.

Article 90 of the UTU's Constitution requires that in the event of a merger, "General Committees of Adjustment shall arrange for a fair and equitable division of the work" and that "[p]rior seniority rights of employees to service on their former seniority district or territory shall be preserved to the extent possible." Pet. App. 6. The UTU has found that the simplest manner in which to integrate seniority lists of merged carriers is by a straight "dovetailed" seniority roster, based upon each employee's hire date on the property at which he was last employed. A straight dovetailed seniority roster was adopted for the St. Louis and Kansas City Hubs. In addition, the UTU adopted the position that former Rock Island employees with prior rights on the Tucumcari Line would retain those rights with respect to the other SSW employees. This did not mean, however, that the Rock Island employees would gain prior rights vis-à-vis Union Pacific employees. Pet. App. 6-7.

During the course of negotiations between Union Pacific and the UTU over the merger Implementing Agreements, the involved UTU General Chairmen attended meetings held by

the affected UTU locals to inform the membership of the status of the talks and to answer questions. At local meetings, UTU Associate General Chairman Don L. Hollis, who represented former SSW employees, specifically inquired whether former Rock Island employees would be granted their Rock Island seniority dates for the purposes of integrating seniority lists. Each time this question was raised, the UTU International officials advised that former Rock Island employees would be integrated into the merged list using their SSW seniority dates, and not their Rock Island dates. In addition, during negotiation planning meetings, it was made clear to local chairmen, including petitioner Local Chairman James Spaulding, that current system seniority dates—not former Rock Island seniority dates—would be used in dovetailing seniority rosters. Appellants' Appendix in the Court of Appeals for the Tenth Circuit ("Aplt. App.") 96-97.

Following negotiations, Union Pacific and the UTU executed Implementing Agreements on July 29 and 30, 1998 for the St. Louis and Kansas City Hubs respectively. Associate General Chairman Hollis was among the UTU officers who signed these two Implementing Agreements. The Kansas City and St. Louis Hub Implementing Agreements provided that employees would be dovetailed into a single roster using their "current seniority date." Pet. App. 7. These Implementing Agreements were put to a ratification vote by the affected Local Chairmen, and a majority voted to accept the Agreements. Pet. App. 7-8.

Union Pacific held a week-long workshop September 14-18, 1998, with affected UTU General and Local Chairmen to construct consolidated seniority rosters for the St. Louis and Kansas City Hubs. At these meetings, the issue of seniority dates for former Rock Island employees was raised, and again it was made clear that former Rock Island employees were to use their SSW hire dates for seniority purposes.

Nevertheless, in August 1998, Associate General Chairman Hollis again questioned why former Rock Island employees did not receive their original Rock Island seniority dates. UTU President Charles Little scheduled a meeting in Seattle, Washington for September 23-24, 1998, to discuss Hollis' concerns. During that meeting, it was once again explained why the UTU did not grant former Rock Island employees their old Rock Island seniority dates. Once again, it was made clear that former Rock Island employees would be required to use their seniority dates with the SSW on the dovetailed roster. It was also confirmed, however, that former Rock Island employees who had prior rights on the Tucumcari Line would retain those rights vis-à-vis other SSW employees. Pet. App. 8; Aplt. App. at 84, 98-99, 316.

On November 1, 1998, Union Pacific began operating under the terms of the St. Louis Hub Implementing Agreement. Union Pacific implemented the agreement for the Kansas City Hub on January 16, 1999. Pet. App. 8, 9.

In the fall of 1998, Union Pacific and the UTU tentatively agreed upon an Implementing Agreement to govern the Salina Hub. This Agreement likewise provided for a straight dovetail based upon employees' date of hire on the property at which they were last employed. Subsequently, Union Pacific served notice of its intent to implement the Salina Hub Implementing Agreement. As a result, a seniority selection workshop was held on November 16-20, 1998, in order to construct a consolidated seniority roster. Pet. App. 8.

As a result of continuing questions raised by Associate General Chairman Hollis, and other issues regarding the implementation of the St. Louis and Kansas City Hubs, a conference was held on December 2, 1998, between Union Pacific and the UTU. Among the items discussed was the fact that former Rock Island employees in the St. Louis and Kansas City Hubs thought they should have been permitted to use their original Rock Island seniority dates for the

dovetailed rosters. Once again, the parties resolved that there was no legal support for granting former Rock Island employees different seniority dates than the dates they held on the SSW. Pet. App. 8-9.

UTU Associate General Chairman Hollis refused to initial the Salina Hub Implementing Agreement because former Rock Island employees insisted that Rock Island dates of hire be used on the integrated seniority roster, rather than their SSW dates of hire. Under the UTU Constitution, the tentative agreement could not be submitted for ratification absent approval of all General Chairmen in the affected jurisdictions. As a result, on January 5, 1999, Union Pacific invoked arbitration under Article I, Section 4 of the *New York Dock* conditions to obtain an Implementing Agreement for the Salina Hub. Pet. App. 9.

Petitioners James Spaulding and Lyn Swonger participated through counsel in the arbitration for the Salina Hub Implementing Agreement, filing a written submission and taking part in oral argument. Spaulding and Swonger argued that former Rock Island employees were improperly denied use of their Rock Island hire dates. They also argued that the proposed Implementing Agreement wrongfully abridged their prior rights. Pet. App. 9, 20-21.

On March 25, 1999, the Arbitrator issued his decision adopting the proposed agreement negotiated by Union Pacific and the UTU as the Implementing Agreement for the Salina Hub. The Arbitrator found that the proposed Implementing Agreement "represent[ed] a fair and equitable method of blending the rights of [former Rock Island] employees with those of other Carrier affected employees." Pet. App. 21. The Arbitrator also rejected petitioners' claim that the proposed agreement conflicted with the court's rulings in *Volkman*, finding that the prior rights granted in that case were specifically subject to future modification through collective bargaining and arbitration. Pet. App. 9, 21.

In April 1999, petitioners Spaulding and Swonger sought review by the STB of the Arbitrator's award. On May 1, 2000, the STB issued a decision denying their petition for review. Pet. App. 10. Petitioners appealed the STB's denial of review to the Tenth Circuit, which affirmed the agency ruling. *Swonger v. STB*, 265 F.3d 1135 (10th Cir. 2001). A petition for writ of certiorari from the Tenth Circuit's decision was filed, which this Court denied. *Swonger v. STB*, 122 S. Ct. 1908 (2002).

On June 2, 1999, while their appeal to the STB was still pending, petitioners filed their Complaint in the instant action, alleging that the UTU and Union Pacific vitiated the seniority rights and prior rights to which they were entitled by agreeing to the St. Louis, Kansas City and Salina Hub Implementing Agreements. By memorandum opinion and order dated December 29, 2000, the district court granted summary judgment to respondents on all of petitioners' claims. Pet. App. 9-10. Petitioners appealed to the United States Court of Appeals for the Tenth Circuit. In a unanimous opinion, the Tenth Circuit affirmed the district court's grant of summary judgment in all respects. Pet. App. 22-23.

REASONS FOR DENYING THE WRIT

Despite the complex factual setting of this case, the legal issues are neither complicated, nor novel. Applying unambiguous statutory provisions, the appellate court correctly held that the district court lacked subject matter jurisdiction over the vast majority of petitioners' claims relating to the Salina Hub because those claims lay within the scope of the STB's *New York Dock* arbitration. *See* 49 U.S.C. § 11321(a); 28 U.S.C. §§ 2321, 2342(5). Through the straightforward application of this Court's rulings in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976) and *United Parcel Service v. Mitchell*, 451 U.S. 56, 61 (1981), the

Tenth Circuit found that petitioners failed to adduce sufficient evidence upon which a reasonable trier of fact could find a breach of the union duty of fair representation such that the integrity of the *New York Dock* arbitration was undermined. With respect to petitioners' claims regarding the St. Louis and Kansas City Hubs, the court of appeals properly found these claims untimely under *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 153 (1983). The court followed an abundance of circuit court precedent in rejecting petitioners' various tolling arguments. None of these rulings call for review by this Court.

1. The Interstate Commerce Act ("ICA") grants the STB "exclusive authority to examine, condition, and approve proposed mergers and consolidations of transportation carriers." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 119-20 (1991); 49 U.S.C. § 11321(a). This authority includes the power to abrogate rights and obligations, including seniority rights, arising under collective bargaining agreements. *Norfolk & W. Ry. Co.*, 499 U.S. at 127-28. The ICA, however, also charges the STB with insuring that railroad workforces are merged according to a "fair arrangement." 49 U.S.C. § 11326. The STB typically guarantees the requisite fairness by imposing *New York Dock* labor protective conditions as a condition for approval of a proposed transaction. The STB further ensures fairness by reviewing *New York Dock* arbitrations for procedural fairness and adherence to the *New York Dock* conditions. *Chicago & N.W. Transp. Co.—Abandonment*, 3 I.C.C. 2d 729, 735-36 (1987), *aff'd sub nom., Int'l Bhd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988). STB decisions, including those affirming *New York Dock* arbitrations, are subject to review only in the courts of appeals. 28 U.S.C. §§ 2321, 2342(5).

Here, the district court found, and the appellate court agreed, that the "vast majority" of petitioners' claims raised

"issues squarely within the scope of the dispute presented to the *New York Dock* arbitrator." Pet. App. 20. Petitioners contend before this Court that they "do not seek in this case to substitute the arbitrator's judgment as to what was necessary to accomplish [the Union Pacific-Southern Pacific] merger." Petition for Writ of Certiorari ("Pet.") 11. As the courts below found, however, petitioners' contention is belied by the plain language of their Complaint, which directly challenges the Arbitrator's determination that the Salina Hub Implementing Agreement represents a fair and equitable seniority arrangement. Pet. App. 20, 45-46.

The appellate court correctly found that the district court lacked jurisdiction to hear petitioners' claims challenging the substance of the Arbitrator's decision, because the authority to review STB decisions rests solely in the courts of appeals pursuant to 28 U.S.C. §§ 2321, 2342(5). In fact, petitioners pursued such review in *Swonger v. STB*, 265 F.3d 1135 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 1908 (2002). Other courts of appeals that have considered the issue are in agreement with the Tenth Circuit that district courts lack jurisdiction over claims collaterally challenging decisions of the STB or its arbitrators. *RLEA v. S. Pac. Transp. Co.*, 7 F.3d 902, 906-07 (9th Cir. 1993); *Bhd. of Ry. Carmen v. CSX Transp., Inc.*, 855 F.2d 745, 748-49 (11th Cir. 1988); *UTU v. Norfolk & W. Ry. Co.*, 822 F.2d 1114, 1120-21 (D.C. Cir. 1987).

Petitioners also claim that the court of appeals ruled that a district court could never exercise jurisdiction over a duty of fair representation claim involving disputes arising out of STB-approved mergers. Pet. 8, 10. Petitioners misread the court of appeals' decision. Applying this Court's precedents, the court of appeals held that petitioners could go behind the Arbitrator's award if it were demonstrated that the union committed a breach of its duty that "'seriously undermine[d] the integrity of the arbitral process.'" *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 61 (1981), *quoting, Hines v. Anchor*

Motor Freight, Inc., 424 U.S. 554, 567 (1976). In this case, however, the district court found, and the appellate court agreed, that petitioners offered "no competent evidence" from which a trier of fact could reasonably conclude that the union breached its duty in such a way as to taint the arbitral process. Pet. App. 22, 49. Before this Court, petitioners simply repeat the same naked allegations that the courts below found to lack adequate foundation in fact. Pet. 13. Petitioners offer no reason to conclude that the lower courts erred in their assessment of petitioners' evidence, or more properly the lack thereof.

2. The court of appeals correctly concluded that the applicable six-month statute of limitations bars petitioners' claims with respect to the St. Louis and Kansas City Hubs. Duty of fair representation claims are subject to a six-month statute of limitations. *DelCostello v. Int'l. Bhd. of Teamsters*, 462 U.S. 151, 153 (1983). The limitation period begins to run "when an employee knows or in the exercise of reasonable diligence should have known or discovered the acts constituting the union's alleged violations." *See, e.g.*, *Lucas v. Mountain States Tel. & Tel.*, 909 F.2d 419, 420-21 (10th Cir. 1990) (collecting circuit cases). Here, "plaintiffs were on notice of their claims at the latest by September 18, 1998, when the consolidated seniority rosters were constructed with the use of their SSW seniority dates." Pet. App. 11. Nevertheless, petitioners did not initiate this action until June 2, 1999—well outside the six-month limitations period.

In an attempt to evade the bar of the limitations period, petitioners resorted to various tolling arguments. First, they asserted the doctrine of equitable estoppel. In order to succeed on an equitable estoppel claim, a plaintiff must demonstrate: (1) that defendant made a definite misrepresentation of fact and had reason to believe that plaintiff would rely upon it not to file suit, and (2) that

plaintiff reasonably relied upon the misrepresentation. *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 59 (1984). Here, the Tenth Circuit agreed with the district court that no reasonable trier of fact could find petitioners' claimed reliance to be reasonable.

Petitioners claimed that the conduct of union officials, in particular statements allegedly made by Associate General Chairman Hollis, misled them into believing that their seniority remained an open issue. The court of appeals found that after the publication of the seniority rosters for St. Louis and Kansas City using their SSW hire date, petitioners could not reasonably rely on earlier statements allegedly to the effect that they would retain their Rock Island seniority. Further, the Tenth Circuit concluded that petitioners could not reasonably rely on "Hollis' 'lone wolf' promises made in defiance of Union's consistent rejection of his position - a rejection of which plaintiffs were admittedly aware." Pet. App. 14. Before this Court, petitioners claim that they have raised genuine issues of material fact as to estoppel, which preclude summary judgment. This argument fundamentally misconstrues the appellate court's decision, which assumed that all of petitioners' allegations were true, but nevertheless found as a matter of law that petitioners could not meet their burden on the equitable estoppel issue. Pet. App. 12-15.

In their second tolling argument, petitioners sought to rely on caselaw holding that pursuit of an internal union appeal can toll the statute of limitations for a duty of fair representation claim. *See, e.g., Volkman v. UTU*, 73 F.3d 1047, 1055-56 (10th Cir. 1996). As the court of appeals recognized, the "fatal difficulty" in petitioners argument is that "no such appeal was taken in accordance with Union's Constitution." Pet. App. 15. The appellate court rejected petitioners' argument, made for the first time on appeal, that the objections raised by Chairman Hollis were part of the Union's constitutional appeal procedure. The court found

that the portion of the UTU Constitution relied upon by petitioners referred to a pre-appeal procedure that was not implicated in the situation at issue. Pet. App. 17. Further, even if Hollis' continued expression of dissatisfaction could somehow be characterized as a proper internal union appeal, the union unambiguously rejected any such appeal at the meeting held in Seattle on September 23-24, 1998—well outside the limitations period. Once the union definitively responded, Hollis' further repetitive complaints could not serve to toll the limitations period. Pet. App. 17, *citing, Stevens v. N.W. Ind. Dist. Council*, 20 F.3d 720, 730 (7th Cir. 1994); *Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 804 (6th Cir. 1990). Thus, even if Hollis' complaints are treated as a proper union appeal, petitioners' claim is still untimely.

CONCLUSION

Respondent UTU respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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